

LOS ANGELES TIMES

June 3, 1938.

Dr. J. L. Pomeroy,
Health Officer,
Los Angeles, California.

Dear Doctor Pomeroy:

This will acknowledge receipt of your letter taking exception to the remarks of Doctor Brady in his column of April 28, 1938.

As you know, Doctor Brady's column is a syndicated feature and the opinions expressed therein are Doctor Brady's and not necessarily those of the *Times*.

I shall be glad to forward your letter to Doctor Brady.

Very truly yours,

THE LOS ANGELES TIMES.
L. D. Hotchkiss, *Managing Editor*.

MEDICAL JURISPRUDENCE †

By HARTLEY F. PEART, ESQ.
San Francisco

Malpractice: Proof of Negligence of a Physician and Surgeon by Testimony Other Than Expert Testimony

The general rule with respect to proof of negligence against a physician and surgeon is that the acts and conduct which may constitute negligence on the part of a physician or surgeon in the performance of a professional service are matters so peculiarly within the knowledge of physicians and surgeons and so far beyond the knowledge of the average man that proof of negligent acts and conduct can only be made by physicians and surgeons. Such testimony of physicians and surgeons is called expert testimony and the evidence which they adduce concerning the propriety of the defendant's acts and conduct is called "opinion evidence."

In rare instances courts have held, under the facts of a particular case, that the act or omission of a physician and surgeon or other professional person was so obviously negligent that the matter could reasonably be said to be within the knowledge of the average man and that as a consequence expert testimony was not necessary. A recent California case relies upon this exception to the general rule requiring proof of negligence against a physician and surgeon to be by means of expert testimony only. In *Thomsen vs. Burgeson*, 93 Cal. App. Dec. 394, decided May 4, 1938, the alleged facts were as follows:

Defendant performed a tonsillectomy upon plaintiff who, at the time, was two years and eight months of age and removed the uvula and a portion of the soft palate and injured the anterior and posterior pillars of the plaintiff's throat. Plaintiff's complaint alleged negligence in the removal of the uvula and a portion of the soft palate and in the injury to the anterior and posterior pillars of the throat, and, in addition, alleged that a trespass had been committed in that defendant "without the consent of plaintiff or his parents, removed said uvula and portion of the soft palate."

At the trial the plaintiff did not produce any expert testimony in support of the allegations of his complaint. Defendant thereupon contended that there was nothing to go before the jury, because, in the absence of expert testimony concerning the propriety of the defendant's act, the jury had no standard by which it could judge defendant's conduct.

The Court, however, held as follows:

Without going into further detail, it is sufficient to state that the evidence reveals a situation which clearly takes the case at bar out of that class of cases in connection with which expert testimony is indispensable. . . . The rule has been declared as follows: "It is equally true that cases which depend upon knowledge of the scientific effects of medicine, or the result of surgery, must ordinarily be established by expert testimony of physicians and surgeons. This rule, however, applies only to such facts as are peculiarly within the knowledge of such professional experts and not to facts which may be ascertained by the ordinary use

of the senses of a nonexpert." So far as an understanding of the operation involved herein is concerned, it would appear to be a matter of common knowledge that the removal of a portion of the soft palate and of the uvula is no part of a tonsillectomy. The location of the tonsils is a matter which is easily observable to anyone, and the location and functions of the uvula and soft palate are matters of common knowledge, and of which the courts can take judicial notice. Therefore, there was evidence in the record, at the time the motion for a directed verdict was granted, sufficient to support a verdict for plaintiff had such verdict been returned.

There can be no quarrel with the rule of law which allows an exception to the general rule requiring proof of negligence against a physician and surgeon to be by means of expert testimony and by no other, in those instances where the alleged negligent act or omission is obviously negligent or may clearly be said to be of a wilful nature. Examples of cases in which expert testimony has been said to be unnecessary are: Where a dentist leaves a decayed tooth in the jaw of his patient and removes one which is sound and serviceable, and where a surgeon undertakes to stitch a wound on the patient's scalp and while doing so thrusts his needle into the patient's eye.

However, conceding the rule to be a sound one, the question arises, should it have been applied under the facts of the case under discussion? It may well be disputed that the alleged acts of the defendant in *Thomsen vs. Burgeson* were such that it could be said to be "a matter of common knowledge" that they would not have occurred if due care had been used. Is it true that "the location of the tonsils is a matter which is easily observable to anyone"? It would seem to be fairly clear that the tonsils cannot be located "easily" by anyone. It would also seem to be clear that the "location and functions of the uvula and soft palate" are not matters of common knowledge. Therefore, it is believed that the District Court of Appeal erred in applying to the facts before it the rule dispensing with the requirement of expert testimony. After all, if the alleged negligence was as clear-cut as the Court believed, there would be no difficulty in proving that fact.

SPECIAL ARTICLES

CALIFORNIA MEDICAL ASSOCIATION

Sixty-Seventh Annual Session, Pasadena*
May 9-12, 1938

California Medical Association Opens Four-Day Session

Speakers Tell Change in Public Attitude

Maintaining that "the one outstanding achievement of the twentieth century, so far as medicine is concerned, is the change in attitude toward venereal diseases on the part of the laity and the medical profession," Dr. Morrow of San Francisco, President of the California Medical Association, opened the organization's sixty-seventh annual convention here today.

Expect Two Thousand Delegates

Eight hundred delegates were registered this afternoon, the number being swelled rapidly as newcomers arrived at the Hotel Huntington, convention headquarters. It is expected that two thousand will be in attendance by the time the conclave ends on Thursday.

Dr. George H. Kress, President of the Los Angeles County Medical Association, gave a short address of welcome to the delegates, and Dr. F. C. Warnshuis, Secretary of the State Association, announced convention highlights.

The president's dinner is scheduled to take place tomorrow night at the Hotel Huntington, and President-Elect Dr. William W. Roblee of Riverside will take office on Wednesday.

Scientific section meetings were held this afternoon, with more such sessions scattered throughout the convention.

The entire patio of the hotel has been turned into a regular "circus" tent, with more than fifty elaborate exhibits being kept open day and night.

Doctor Morrow's address, a review of the medical world's stand in the fight against venereal diseases, was the feature of the morning session. . . . —Pasadena *Star-News*, May 9.

* Paragraphs here printed have been taken from press reports.

† Editor's Note.—This department of CALIFORNIA AND WESTERN MEDICINE, presenting copy submitted by Hartley F. Peart, Esq., will contain excerpts from and syllabi of recent decisions and analyses of legal points and procedures of interest to the profession.

Wives Visit Film Studios as Doctors Open Sessions

Convention of Woman's Auxiliary Will Get Under Way at Vista Tomorrow

Forming an advance guard for the delegation to the ninth annual convention of the Woman's Auxiliary to the California Medical Association, two hundred doctors' wives registered at the Hotel Huntington today.

A pre-convention board meeting, held in the Crystal Room, was presided over by the State president, Mrs. Hobart Rogers of Oakland, and after that the feminine contingent attended the general session of the sixty-seventh annual State Medical Association convention in the ballroom.

An informal luncheon, and then almost the entire delegation of women were off in busses for the motion picture studios of Hollywood, expecting to be back tonight to dine with their husbands, and to hold a reception and musicale at nine o'clock in the hotel for the wife of Dr. Howard Morrow, outgoing State Association president.

The Woman's Auxiliary will really get into action tomorrow morning at 9:30 o'clock at the Hotel Vista del Arroyo, when it conducts its first general meeting, with Mrs. Rogers presiding.

Luncheon at the Vista will follow the meeting, and tomorrow afternoon there will be sight-seeing trips. The women, of course, will attend the president's dinner and dance the Huntington tomorrow night. They will wind up their convention on Wednesday, with a post-convention state board meeting in the afternoon.

The Credentials and Registration committees worked fast and furiously this morning on the mezzanine floor at the Huntington. Mrs. Charles C. Hall, Chairman, was assisted by the local chairman, Mrs. Mark Albert Glaser.

Mrs. Arthur T. Newcomb of Pasadena, General Chairman, is being assisted by many other local doctors' wives on the various committees.

Charming young hostesses making themselves generally useful at the convention are daughters of Auxiliary members, and include a number of Pasadena girls.

The incoming State president, Mrs. Clifford Andrews Wright, will be honored at luncheon on Wednesday at the Vista, and the past State presidents also will be guests of honor.

Members of the State Advisory Board will be honored at a luncheon at the Vista tomorrow, when presentation of the Doane membership trophy will be made by Mrs. William Henry Sargent of Oakland.

Dr. Lowell S. Goin of Los Angeles, will speak at the luncheon on "Crux Medicorum." — Pasadena Star-News, May 9.

AMERICAN MEDICAL ASSOCIATION

Eighty-Ninth Annual Session, San Francisco*

June 14-17, 1938

Medical Leaders Here, Map Study of Physical, Social Ills

Vanguard of Doctors Arrives in San Francisco

America's men of medicine, in whose skilled hands is held the health of the nation, yesterday converged upon San Francisco to focus their combined attention on both scientific and social problems.

A few minutes after he arrived at the Sir Francis Drake Hotel, Dr. Morris Fishbein, editor of the Journal of the American Medical Association, said that the Association will participate July 18, 19, and 20 in the Washington conference on a national health program.

He added the announcement that the American Medical Association has invited Josephine Roche, under whose leadership the Washington conference will take place, to address the convention here Tuesday afternoon. Miss Roche, former Assistant Secretary of the Treasury, in charge of public health, accepted the invitation and will either appear personally or send a representative to speak for her.

"Miss Roche has been asked to explain her program for national health service distribution, a program she is working out from a social security point of view," Doctor Fishbein said.

Sees Agreement

A vast majority of the nation's doctors oppose any form of "social medicine," which would interpose a federal bureaucracy between physician and patient. The medical men recognize as an economic problem the distribution of their services. Doctor Fishbein's announcement of Miss

* Paragraphs here printed have been taken from press reports.

Roche's appearance immediately focused convention attention on the profession's great issue of "tax paid" medicine.

Doctor Fishbein indicated his belief that "a rapprochement is in sight" between the profession and the Government.

Leaders Arrive

Scientifically, said the veteran spokesman for the American Medical Association, the convention will bring forward for discussion more than 350 reports, representing the advance of a year in medicine. And a great exhibit in the Civic Center will present 150 doctors demonstrating the techniques and facilities of the modern science of healing.

"This national convention will be a demonstration that medicine never stands still, always advances," said Doctor Fishbein. "We can see in the future, for example, the complete eradication of some of the deadly diseases."

Ready to work, to renew friendships, and to see San Francisco, the leaders of the American Medical Association arrived yesterday, preceding the host of 7,000 doctors who will participate in the convention, opening formally on Monday.

In the vanguard were: Dr. J. H. Upham of Columbus, Ohio, president of the Association; Dr. Irvin Abell of Louisville, Kentucky, president-elect; Dr. Olin West, secretary; Dr. A. W. Booth of Elmira, New York, president of the board of trustees; Dr. C. B. Wright of Minneapolis, trustee; Dr. H. H. Shoulders of Nashville, Tennessee, vice-speaker of the House of Delegates; and a score of other distinguished men.

Many were accompanied by their families. With Doctor Fishbein were Mrs. Fishbein; their daughter, Marjorie; and son, Justin.

A western welcome ushered in the American Medical Association. At Ogden the Southern Pacific's "Forty-niner" was boarded by Oakland doctors, with an orchestra and entertainment. At Berkeley, Dr. Frederick C. Warnshuis of San Francisco, for the California Medical Association, welcomed the arrivals. The doctors were driven to their Sir Francis Drake Hotel headquarters, then returned to the East Bay.

They visited Diablo Country Club and were entertained at the Claremont Country Club last night by the Alameda Medical Society.

San Francisco already was the world's medical center when the American Medical Association leaders arrived. The American Psychiatric Association was completing its week of work at the Fairmont Hotel. Across the street, at the Mark Hopkins, the American Ophthalmological Society was conducting its seventy-fourth annual convention.

Other Sessions

The American Heart Association was in session at the Sir Francis Drake. With their microscopes, 150 men and women were at the Palace Hotel for the meeting of the American Society of Clinical Pathologists. The Association for the Study of Allergy met at the Empire Hotel.

And at Del Monte the American Academy of Pediatrics and the American Dermatological Association convened. Other medical groups will meet simultaneously with the American Medical Association in San Francisco next week.—San Francisco Examiner, June 11.

Five Thousand Physicians Throng San Francisco for Medical Meeting

Convention Opening Tomorrow to Review Progress of Medicine During Past Year

As one doctor to another, leading medicos of the nation tomorrow will open discussions on humanity's ills and the progress medicine has made the past year in making a happier and healthier life for mankind.

Sessions of the American Medical Association's eighty-ninth annual convention continue through Friday with approximately five thousand members in attendance. Their discussions, scientific and technical exhibits focus the attention of the medical world on San Francisco.

Three major types of activity are included in the program arranged at a preconvention meeting of Association officers yesterday. These include scientific and technical exhibits, scientific meetings in which hundreds of papers describing the year's advances in medicine will be heard and sessions of the House of Delegates, in which are determined the policies of organized medicine.

Scientific Exhibits

Scientific and technical exhibits will be set forth in the Civic Auditorium; scientific meetings will be held in adjacent buildings in the Civic Center and the House of Delegates meeting in the Sir Francis Drake Hotel.

The scientific exhibit consists of more than 150 displays prepared by leading investigators to demonstrate the prog-